No. 11858.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

FRED HARVEY, a corporation,

Appellant,

vs.

ELMER MATEAS,

Appellee.

APPELLEE'S BRIEF.

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Appellee's Criticism of Appellant's Argument.

(Figures in brackets refer to pages in the printed transcript.)

Appellants synopsis of the pleadings, and such portion of the evidence which is favorable to him, is fairly correct, but has many omissions and errors which will be reviewed as we proceed.

Appellant has an error in his very first paragraph (Brief 1).

In the former case to which he refers, in which these same parties were actors, there was no motion to dismiss. On the contrary, a motion for nonsuit was granted.

Appellant's most flagrant omission is the testimony of appellee and appellee's wife as to what they heard the appellant's investigator read to them [186 to 197] when Mr. Mateas was in the hospital, suffering intense pain, a short time after the injury. The investigator asked questions, on the representation that he was doing this for the purpose of settlement [188] and that such settlement would follow shortly; he then wrote something on a paper [188]; he refused to give either Mr. Mateas, or his wife, a copy, or permit them to read this paper [188-189]; but he then read something to them, supposedly all the words which he had written. Did he? Or did he not read ALL? He is not produced! Mr. Mateas and his wife say the portion upon which appellant lays so much stress was NOT read to them; they never read the paper until it was produced in Court [186-189]. Appellant cannot then in good conscience rely upon it!

Appellant states as a proposition of law:

> "The owner of a horse or mule hiring the same to another is not an insurer." (Brief 10, par. IV.)

In the immediately preceding paragraph (Brief 9) appellant objected to an instruction containing the same statement, "The defendant was not an insurer of the safety of the plaintiff."

Appellant admits this statement on one page, but objects to an instruction which embodies it ten lines before. Just where does appellant stand? Which side of the legal fence is he on—or both?

Appellant may answer that he objected to the whole instruction, and could not separate the two sentences in it. And why not? Perhaps if he had attempted to do so, the Court might have agreed with him. Since he did not do

so, and since he must accept his own objection to the whole paragraph (Brief 10) he then again contradicts the immediately following statement. Or will appellant admit that the Harvey Company was an insurer? If appellant accepts a portion of a statement by admitting it, mustn't he accept the balance—when he does protest it?

The balance of the criticised instruction is the same as the question of whether "Chiggers" was unfit for the purpose. Evidently he was.

No fit and proper mule would buck off a paying passenger, and cause a lawsuit lasting for six years!

> "The only evidence in support of appellee's case is that dealing with the conduct of 'Chiggers' on this particular trip prior to the time of the accident." (Brief 11.)

Appellant is much mistaken. Appellee is concerned also with the conduct of appellant's employees in permitting this mule, fresh from pasture, to make the trip, anyway, and compelling appellee to ride this mule, after criticism of its actions. Appellant's witnesses told with great detail the precise methods taken to toughen the mules so they would be safe to carry passengers [93, 94, 207, 210]. Appellant's brief carefully omits this (Brief 10-8).

Appellant casually refers to Bradley [207-210] but omits the equally important details given by Mr. Ennis, Sr., assistant manager of the transportation department of Harvey Company [93-94]:

> "He (the mule) runs on pasture all winter without shoes. The first thing that is done is shod, and then he is put on a two-day trip, which is an easy trip. The mule is too soft to make the round trip up and down the canyon in one day; so he is put on the two day trip, and that is the way they are hardened up to the trail."

Evidently this dear little pet was too soft to make half a trip in half a *day*.

"It is a close question as to whether this evidence (Chigger's conduct prior to the accident) was sufficient to support findings in favor of appellee on these two points" (Brief 11). What more evidence would be necessary than there is, to at least support a *prima facie* case? No one disputes the fact that "Chiggers" did not stay in line as a mule was intended to do, nor that Mr. Mateas could not handle him, nor that mules were attempted to be changed at Indian Gardens — for some reason.

Appellant thus concedes that if there was such evidence, it would be sufficient to support the judgment. "It was a close question" (Brief 11). The jury decided this "close question" adversely to him. Reviewing courts do not substitute their findings of fact for those of the jury.

"On the previous trial, with substantially similar evidence, the learned trial Court felt the evidence was, as a matter of law, insufficient" (Brief 11). Appellant is also in error in this statement. There was not "substantially similar evidence." Neither Mrs. Vogel, nor Mrs. Rayle testified; the report of the investigator was not produced; young Ennis was not presented; no jury was present. That appeal was decided upon an entirely different law point—and was reversed.

"Any error committed in connection with the admission of such evidence (as to how the mule acted down the trail) would necessarily be highly prejudicial" (Brief 11). Not necessarily so, since, after all, the jury is concerned only with the determination as to facts. No error is charged as being committed in connection with the

admission of evidence as to how the mule acted down the trail.

In several instances it would seem that appellant argues himself out of court—so to speak.

"Any evidence as to how the mule acted from the time appellee got on it at the corral is extremely important" (Brief 11). As appellant admits that, then no conversation between Mr. Boles and Mr. Mateas, whether overheard, or reported, by Mrs. Vogel, could change the act of the mule. If the conversation did not change the actions of the mule, then it could not be vital. Mrs. Vogel testified [152-153], and Mrs. Mateas [173] also, to what they actually saw with their eyes. This could not be hearsay, nor does appellant charge that it is. He worries only about the conversations. The Court did not admit this conversation to bind the appellant [156, 157, 158, 159]. He admitted it as being an experience down the trail, just as if some member of the party had caught a butterfly.

Mrs. Mateas testifies (going down the trail):

> "* * * I would notice when I would look back to see how he (Mr. Mateas) was doing, and I would notice the mule at different times try to pass the other two mules ahead of him" [173].

Mrs. Vogel testifies as to what she saw of the actions of "Chiggers" while going down the Canyon: "It appeared to me that he bucked—it caused such a commotion every time, which was at least a dozen times" [153].

Other experiences down the trail were testified to without objection; the stop for photographs [241]; the stops for rest; the stop to cinch the mules [242]; the advice (orders) given by the guide as to how the party should

conduct themselves [242]; the squeak of leather; the noise of iron hoofs on dirt and gravel.

"If the mule was unfit, * * * recovery by appellee in no wise depends on what he said about the mule to others, than to appellant's employees, or what any of such other persons may have said to him" (Brief 11). If recovery does not depend on the conversation down the trail, then it could work no harm to appellant. How does one determine "materiality"? Isn't this the test? "If this testimony were omitted entirely, would there be enough left without it?" If we are correct in this laymen's definition, then we ask "If Mrs. Vogel's testimony as to what she heard down the trail were omitted, would there be sufficient testimony left to uphold the verdict"? Since the answer is "Yes," then why all the pother!

Appellant's answer is (Brief 11) that by admitting this evidence. the Court gave the jury an idea that in some way (which is unexplained) the evidence was material—or tended to prove some fact in issue. Such an intelligent jury could not have received such impression from the statements carefully made by the Court several times. The Court was most careful that the jury should NOT receive the impression which appellant suggests [158, 159]. The Court received the testimony for a limited purpose only [120-121].

"The only thing which they (the jury) possibly could conclude that the conversation tended to prove, was that the mule acted up even before it reached Indian Gardens" (Brief 11). They didn't need any more evidence than they already had from Mr. Mateas [118]; Mrs. Mateas [192, 193-172]; Mrs. Vogel's own observations

[163] as well as theirs and Mrs. Rayles [203] testimony, of the conversations with the guide at Indian Gardens. Even he admits there was talk there about the mules. If there are several conclusions which can be reached, it is not for appellant to say that the one he prefers is the only one possible.

Appellant contradicts himself when he says "If the mule had been acting up during the trip, it made no difference whether or not appellee had complained to any other excursionist, or whether or not any other excursionist had offered to exchange mules" (Brief 14). Then again, Mrs. Vogel's report of conversations would be of no injury to appellant.

"Whether or not appellee and Mr. Boles had a conversation before reaching Indian Gardens was not a fact in issue" (Brief 14). Then why worry about the repetition of that, or any conversation? It is never possible in a trial to keep from the jury every fact of which defendant does not approve. There were many other facts which were "not in issue," yet testified to by witnesses for each of the litigants.

Appellant then tries sophistry. He is first talking about Mrs. Vogel's testimony as to conversations; then he uses this as inclusive in his term "any evidence," and then — basing his conclusion on a false premise and incorrect arguments,—he propounds this heavy conclusion, "any error connected with the admission of such evidence (that is, any evidence as to how the mule acted—not any evidence as to what Mrs. Vogel heard) is prejudicial." This reasoning is vicious, unless discovered and commented upon.

Robert Ennis, the guide, did not testify that he did not hear this conversation on the trail. He half-heartedly

says he didn't "Hear anybody making any complaint about the manners of Chiggers" [243]. He had never used "Chiggers" before [240].

Mr. Wilson and Mr. Ennis [102] also say that "Chiggers" was more often used as a guide mule—he was so sweet, and gentle and kind, and loving, and like a pet! [99-179]. In that case, it was even more careless for appellant's employees to place this mule as last in line on his first day after pasture. As men with many years' experience in the pecularities of mule nature—they knew—or should have known, what "Chiggers" reaction would be when given a place in the rear, when he had been so often in the lead. Such ignominy would meet with only one result—his mulelike desire to acquire his more normal, customary place in the front of the line, from which he had been demoted—and on his very first day, too!! He'd "show 'em." He would get to the front, and if they wouldn't recognize his rights, he would get rid of his incubus. If this was just an ordinary plow mule, you couldn't give it credit for such intellect—but—according to the praise of appellant's witnesses, they wouldn't be surprised if "Chiggers" talked—of course, in a soft, melodious voice!

"The jury must have understood the ruling of the Court to mean that in arriving at their verdict upon the issues submitted to them, and if they found the conversations to have taken place, then they were to give weight to them as tending to establish the conduct of the mule on its way down the trail" (Brief 14, 15). How can anyone determine whether or not any particular evidence makes an impression upon a jury? The appellee has just as much right to argue that the jury did not consider this conversation at all, in arriving at their verdict; that they

did not need to, as there was plenty of evidence before them on which their verdict could be based, and on which this Court would uphold it.

All appellant's witnesses (except the physicians) were employees, or former employees for many years, of the Harvey Company. Their testimony was most naturally influenced by this relationship.

Mr. Wilson, brought here from Alameda by appellant, says that from a lead position he could not hear conversations taking place two mules from the rear. He was talking about a string of ten mules, which is his usual [182] and customary number [183]. He did not say, nor did anyone say, that the guide could not hear conversations only five mules back. Nor was he talking about this occasion. Mr. Mateas was and is a very deaf man, carrying with him at all times a necessary hearing aid [102-103]. Therefore it is necessary to speak much louder to him than it is to ordinary persons. There was no noise in the canyon—except the squeak of the leather and the slither of the hoofs of the mules [182]. These were ordinary, customary and expected sounds to the guide. This Court will take judicial notice that a person does not usually take special notice of those sounds to which he is accustomed, or which he expects. The ear will ignore them. He will, however, notice sounds which are out of the ordinary, or unexpected. Therefore, it was most natural that the guide could, and probably did hear this conversation which must have been carried on in a very loud tone by Mr. Boles.

The guide says he did not remember the talks at Indian Gardens about "Chiggers" actions, and Mr. Mateas' fear, but probably the jury did not believe him. His answer was not a very convincing one [244].

Appellant's authorities are not helpful to his contentions:

> "However, irrespective of the question of evidence, it is well settled that the giving of correct instructions upon an abstract proposition of law not entirely applicable to the circumstances of a particular case does not warrant a reversal unless it clearly appears that the jury was misled thereby to the prejudice of the appealing party.
>
> And in the present case, even though it be assumed that the evidence above narrated was not enough to warrant the giving of the two instructions under consideration, Appellants have not suggested any facts, nor presented any argument to show that the jury was misled thereby to appellant's prejudice."
>
> *Valencia v. San Jose.* 21 Cal. App. (2d) 469, 475.

Nor is *Weiss v. Davis,* 28 Cal. App. (2d) 240, of value to appellant.

The contention was there raised that by plaintiff's implied consent to the excessive speed of the auto in which he was riding, he thereby assumed all risk of injury. The Court there said:

> "that contention is too broad" (at p. 243). "* * * Granting that the plaintiff assumed the risk of traveling 75 miles per hour, there is nothing in the record showing he assumed the additional risks just mentioned above."
>
> *Weiss v. Davis,* 28 Cal. App. (2d) 240, 244.

So with us. If it could be said that Mr. Mateas assumed the risk of the acts of the mule *before* Indian Gar-

dens, he certainly did *not* assume the greater risk of being bucked off—a risk of which he had no warning—certainly not from appellant.

He was entitled to obey the instructions of the guide. Wasn't the guide competent? Then when he ordered that appellee *must* remount "Chiggers," he impliedly said the mule was as safe as appellee had been led to believe when he read the alluring advertisement about the surefooted animals taking thousands down this same trail "in safety." [Pltf. Ex. 1-P.]

Appellant evidently takes the position that appellee should not have ridden "Chiggers" again after the party arrived at Indian Gardens. What else would he do? Walk back? Or be left there? He must do one or the other —or else remount his mule.

He must obey the guide.

> "He (Bob) said we were all to ride the mules we started with [163]. Bob said I had to keep the mule I started with * * * Ennis said we couldn't do it (change mules) [122]. We had to remain on the mules we started with [123]. The guide made him change mules [193]. Mr. Ennis made them resume their own mounts" [203].
>
> "Mrs. Vogel: I heard Bob Ennis tell him to get back on his own mule, on the mule he rode.
>
> The Court: Tell who?
>
> The Witness: He told—he told Mr. Boles to ride his mule and Mr. Mateas to ride his mule.
>
> Q. What, if anything did Mr. Boles answer? A. Well, he said that he was afraid that Mr. Mateas' mule would buck, and that being that he knew how to handle mules better, why, he thought he should ride him.

Q. Well, what did Bob say to that? A. He said that we were all to ride the mules we started with" [163].

Mrs. Mateas overheard a conversation between Mr. Boles and Bob (Ennis) at Indian Gardens:

"I overheard Mr. Boles say that the reason they had changed mules was that my husband's mule was constantly trying to pass the other mules and get ahead of them and that he was a skittish mule and my husband was afraid of the mule, and that he thought or he knew he could ride the mule and it would be a better idea for my husband to ride his mule, Mr. Boles' mule" [174].

Mr. Mateas testifies:

"Bob said I had to keep the mule I started with. Mr. Boles told him that I had a skittish mule and that his mule was a perfectly safe mule, and he preferred to trade over. And Ennis insisted we couldn't do it [122]. We had to remain on the mules we started with" [123].

Mrs. Mateas testifies:

"Bob (the guide) told him (Mr. Mateas) at that time that we had to remain on the mules we were assigned at the top of the hill [174]. They then changed back [174]. This was when my husband was on the other mule [192]. The guide made him change mules" [193].

Mrs. Rayle testifies: I overheard Mr. Boles talk to the guide at Indian Gardens [202] "that the mule Mr. Mateas rode bothered him, and Mr. Boles wanted to change with him, and they did that at Mr. Boles' suggestion [203]. Mr. Ennis made them resume their own mounts" [203].

Mrs. Vogel evidently "hit the nail on the head" when, during cross-examination:

> "Q. Have you discussed this matter with anybody before coming into Court? A. Well, I have told dozens of people about the injustice of it * * *
>
> Q. You are interested in the outcome, are you not? A. Well, only as a matter of justice."

(A man was seriously injured, through no fault nor desire of his own, in June 1942. We are now nearing June 1948—nearly six years—and the defendant still refuses to recognize any duty owed to customers.)

Appellee now refers this Court to the position taken by appellant during the course of counsel's argument with the trial court concerning the settlement of the proposed jury instructions [250 to 308]. Both sides had submitted their respective endeavors, but the trial Court, more learned than counsel, was careful, and kind enough, to write his own [254].

> "The Court: The law raises the implied warranty, if nothing had been said [252].
>
> Mr. Lincoln: Yes * * *
>
> Mr. Schell: I think so. That would be implied warranty Your Honor just outlined.
>
> The Court: Do you gentlemen view this transaction a hiring of personal property?
>
> Mr. Schell: Yes, or renting * * *
>
> Mr. Lincoln: It seems to me so, yes Sir [253].
>
> * * * * * * * *
>
> The Court: * * * I have come to the conclusion that express warranty here does not contain any greater content than implied warranty * * * [256].

Mr. Schell: I think I see nothing in the first nine (to criticize) * * *

Mr. Lincoln: I had no criticism of all of them * * *" [257].

Mr. Schell was satisfied with instructions 1 to 11 [262]; No. 12 [264], No. 13 [265], No. 14 [266], No. 15 [266], No. 16 [266], No. 17 [267], No. 18 [268], No. 19 [269], No. 20 [269], Nos. 21 to 35 [269, 270], but desired his proposed No. 27 to be included [270 to 273].

* * * * * * * *

"The Court: Your instruction No. 27 is based upon the assumption that if he knows of a risk he assumes it, even though it may be caused by a breach of warranty.

Mr. Schell: I think this is a standard instruction on the assumption of risk, this 27 and 28.

The Court: I think the case you put [288] the question would be one of contributory negligence and not assumption of risk, because it presupposes negligence of the defendant.

Mr. Schell: Yes, it presupposes [289] * * *."

* * * * * * * *

"The Court: That is where the assumption of risk would blend into your contributory negligence.

Mr. Schell: Yes, there is a very fine line of demarcation where one starts and the other stops. It is very difficult.

The Court: If the risk, caused by certain negligence of the defendant, had proceeded for such a long time it was part of the inherent nature of the undertaking" [291].

* * * * * * * *

The Court: Do you gentlemen have any further suggestions or comments with respect to the intended instructions now?

Mr. Schell: Not any more. * * *

Mr. Lincoln: I have none; no, Sir" [295].

* * * * * * * *

The Court: * * * Has the defendant any exceptions to note on the record with respect to the instructions thus far given?

Mr. Schell: No, Your Honor, except the instruction on the—the assumption of risk * * * in other words he assumed any risk, even though that risk might have been caused by the defendant provided that plaintiff knew [307].

The Court: That an act or omission of the defendant might have gone on for a sufficient period of time back to prove the inherent risk of the enterprise [307-308].

Mr. Schell: That is correct.

The Court: And have been known, of course, to the plaintiff, or, in the exercise of due care, he should have known. That is your contention?

Mr. Schell: That is my contention, yes. * * *

The Court: I have in mind your contention on that. I think that is the law, but I do not see any application of it to this case" [308].

Cases cited by appellant (Brief 10) are livery stable cases, about which the trial Court said: "It is not the usual livery stable hiring of animals because of the control which the defendant had over the animal."

Summary of Appellant's Brief.

Appellant's position seems to be:

(1) That it was improper to admit Mrs. Vogel's report of conversations which she heard—assuming that they were not in the hearing of defendant.

Appellee answers:

These conversations must have been loud enough to be heard by defendant's employee; even if they were not—their admission was not necessary to convince, or even influence, the jury.

(2) Appellee assumed every risk which ever could be thought of in connection with riding a mule; particularly the risk of being bucked off after rest at Indian Gardens, or any other time.

Appellee answers:

He was entitled to rely upon (a) the written warranty [Pltf. Ex. 1-P, p. 106] which was the condition precedent to his ride; (b) he was compelled by positive orders from appellant's employee to place himself in a position which he could not have known to be dangerous (because of his lack of experience in riding mules), and which that same employee should have known to be dangerous—because of his many years of knowledge of mule nature, his experience with mules, and (most important) statements made to him of the mule's antics and appellee's fear; (c) it is evident the mule had not been sufficiently toughened that season, as required, to privilege it to carry dudes.

Appellee's Position as to the Law Involved.

(a) *This Was a Jury Trial During Which There Was a Conflict of Evidence. That Conflict the Jury Resolved in Favor of Appellee.*

"All conflicts must be resolved to support the verdict, and in favor of the implied findings of the jury —since it is the sole judge of the credibility of the evidence and the weight of the evidence * * * in determining whether a judgment must be reversed because of errors in instructions, we are required to examine the entire cause including the evidence and decide whether in our opinion the errors HAVE resulted in a miscarriage of justice."

Hobart v. Hobart, 28 Cal. (2d) 412, 447.

"Whether the evidence is clear and convincing must be determined by the trial Court and this Court must accept the determination as conclusive if there is substantial evidence to support it."

Baines v. Zuieback, 84 A. C. A. 609, 614;

Stromerson v. Averill, 22 Cal. (2d) 808, 815.

Even if the trial Court did err in admitting the testimony of Mrs. Vogel, such error was of no consequence:

"The general rule prevailing in California on this subject is this:

"Where there is competent evidence in the record which supports the judgment without recourse to the testimony erroneously offered, generally the error is not prejudicial, as it will be presumed on appeal that the trial Judge considered and relied upon the competent evidence in making his findings and rendering the judgment."

Keating v. Basich, 66 Cal. App. (2d) 258, 263, and cases there cited.

(b) *One Assumes Such Risks as Are Natural and Expected in an Enterprise—but Not Those Which He Could Not Foresee, nor From Which He Had Received a Written Warranty of Safety.*

"While a person assumes the perils which are naturally incident to the position he takes—yet he does not assume dangers which can come only from the negligent acts of another."

Hedding v. Parsons, 76 A. C. A. 578;

46 Cal. App. (2d) 404;

65 Cal. App. 249;

65 Cal. App. (2d) 729;

59 Cal. App. (2d) 1, 9;

41 Cal. App. (2d) 664, 668.

Much of the argument and law which appellee could here present, has been read by this Court in briefs filed in the first appeal in this same case when this appellee was then the appellant (case No. 10783). To these, appellee respectfully refers this Court, in order that he may not be too repetitious; particularly the reply brief of appellant there (appellee here).

Respectfully submitted,

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